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Supreme Court, U.S.
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No. 98-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLOBE INTERNATIONAL, INC.,

Petitioner,

v.

KHALID KHAWAR,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF

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1. PERCEIVED MISSTATEMENTS PURSUANT TO RULE 15.2.

Respondent Khalid Khawar is obliged to point out a couple of misstatements in Globe International, Inc.'s petition. Globe asserts that Robert Morrow "also wrote *Betrayal*, a *New York Times* best-seller" and that Morrow was a "best-selling author". Pet. 2, 5, 6, 9. However, the record cited by Globe does not evidence this assertion (Pet. 2), and Khawar is unaware of any such evidence in the record.

In a similar vein, Globe describes Morrow as "an established authority on assassination conspiracy." Pet. 2. The record cited in support of that assertion references testimony by a witness who testified for Khawar, in which the witness acknowledged — "with some bewilderment" — that Morrow remains a figure in the President Kennedy assassination controversy who is frequently consulted as an authority in the closed world of assassination conspiracy theorists. The witness, however, also testified that his negative opinion of Morrow's credibility was shared by the majority of researchers in the assassination community. App. 32a. Insofar as the academic or journalistic communities are concerned, there was no evidence that Morrow's reputation qualified him as an established authority on public affairs. *See* App. 31a.

Globe also states that the jury found that the *Globe* article is a neutral and accurate report of the Morrow book. Pet. 3. The trial court determined, however, that the *Globe* article was not an accurate and neutral report of the statements and charges made in the Morrow book, thus disagreeing with and rejecting the jury's advisory special verdict. App. 5a. The Court of Appeal's opinion also noted that there were many

other items of evidence that supported a finding that the article was not a neutral and accurate report of the book. S. App. 5 n.1.

II. GLOBE'S ARGUMENTS.

The arguments made by Globe, a purveyor of supermarket tabloid magazines, and of the mainstream media organizations who filed *amici curiae* briefs[1], regarding the issues of actual malice, the neutral reportage theory and the involuntary public figure hypothetical, have been rejected by a unanimous California Supreme Court in a well-crafted opinion by Justice Kennard. Globe's undocumented fear of the chilling effect that the opinion has caused, or will likely cause, appears to be refuted by well publicized incidents of scandal mongering of recent vintage regarding both public and private figures who have contacts with the State of California.

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1. The *Amici Curiae* before the California Supreme Court and/or California Court of Appeal are: Los Angeles Times, The New York Times Company, The Associated Press, CBS Inc., National Broadcasting Company, Inc., American Broadcasting Companies, Inc., Newsweek, Inc., Tribune Company, The Association of American Publishers, The Society of Professional Journalists, McClatchy Newspapers, Inc., The Copley Press, Inc., Knight-Ridder Publishing, Inc., San Jose Mercury News, Inc., The California Newspaper Publishers Association, The Reporters Committee for Freedom of the Press, The Hearst Corporation, Publisher of the San Francisco Examiner, Ziff-Davis Publishing Company, Donrey Media Group, Harper's Magazine Foundation, Radio-Television News Directors Association, The California First Amendment Coalition, The American Civil Liberties Union of Northern California, The ACLU Foundation of Southern California, King World Productions, Inc., The Chronicle Publishing Company, The Daily Journal Corporation, Lesher Communications, Inc., The Recorder, and The San Francisco Bay Guardian.

Khawar does not dispute that the Circuits are in conflict regarding the existence of a neutral reportage theory concerning defamatory statements made about public figures. *See* App. 17a-18a. However, the application of the neutral reportage theory to private figures is a distinctly minority viewpoint. *See* App. 20a & n.4.

The rise of the Internet, the decentralization of media centers, and the proliferation of numerous narrow bandwidth media, do make the consequences of the neutral reportage theory of *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, *cert. den.*, 434 U.S. 1002 (2d Cir. 1977), potentially more pernicious and pervasive. The field of republication — which includes recountings and interpretations of what someone else said, saw, heard, felt or wrote — may well cover the vast majority of publications. *Cf. Time, Inc. v. Pape*, 401 U.S. 279, 285-86 (1971).

The California Supreme Court has clearly rejected such an obliteration of the common law rule on republisher's liability (*see, e.g.*, Rest. 2d Torts, § 578), as to private figures. Thus, any publisher doing business in the State of California is bound by the opinion below. As to public figures, Khawar does not quarrel with the observation of the prevailing counsel of record in *Edwards,* that the central issue of *Edwards* "was novel when decided in 1977 and remains unresolved today" and that "[w]ith *Edwards*, the Second Circuit is a step ahead of the Supreme Court — not always a safe place to be. . . ." Abrams, *The First Amendment in the Second Circuit: Reflections on Edwards v. National Audubon Society, Inc., the Past and the Future*, 65 St. John's L. Rev. 731, 737, 741 (1991).

Furthermore, Globe to date has cited only one federal or state appellate case applying the involuntary public figure theory, *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), in the quarter century since the Court's speculation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), that:

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.

The Court has never found a person to fall within this *dictum*. *Cf.* Rosen, *Media Lament — The Rise and Fall of Involuntary Public Figures*, 54 St. John's L. Rev. 487 (1980).

Globe and its erstwhile allies have had the opportunity to voice their arguments to the California Supreme Court and Court of Appeal. They continue to do business in the State of California, presumably in accordance with the putatively onerous ruling of the California Supreme Court. That Globe cannot cite or document modification of media behavior in light of that ruling only suggests that the "chilling effect" is a fable. Khawar, moreover, argues that, if anything, the stentorian impulse to negligently and recklessly republish unverified allegations, vilification and slander under the guise of "neutral reportage" is on the increase, as the Internet, cable television, talk radio, desktop publishers and paramedia outlets crowd out the mainstream media organizations represented by the *Amici Curiae* below. There may indeed be a threat to the First Amendment, only it comes, perhaps, from those new media who would cite its letter in order to subvert its spirit.

CONCLUSION

The California Supreme Court's analysis is the proper balancing of First Amendment and personal reputation values. Affirmation of this analysis, together with overruling the neutral reportage theory of *Edwards* and retiring the "involuntary public figure" hypothetical would be in the public interest — not to mention, in this new media age of "flash and trash"[2] — in the long term interest of the press as well. The Court should therefore grant the petition to resolve these issues.

Respectfully submitted,

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2. *See, e.g.*, Shaw, "Obsessed with Flash and Trash," *L.A. Times*, Feb. 16, 1994, § A, p.1.